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The Employer's Intentional Tort - Should it be Recognized in Canadian Jurisdictions?

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"The bottom line of this case is that prohibiting an employee from suing his or her employer for intentional tortious injury would allow a corporation to "cost-out" an investment decision to kill workers. This abdication of employer responsibility, as represented by the dissenters, is an affront to the dignity of every single working man and working woman in Ohio."

Frank Celebreeze, Chief Justice of the Supreme Court of Ohio[1]

I. *Introduction*

At the inception of Canadian worker compensation legislation, an historic trade off agreement was made between employers and their workers. By virtue of this agreement, the right of workers to sue their employer in tort was removed and in return workers were to receive swift, certain, but limited, compensation payments for job-related injuries and illness, regardless of fault. With a few minor exceptions[2], this agreement made worker compensation the exclusive remedy available to an injured worker. It also lodged with the various provincial worker compensation boards the responsibility to adjudicate whether or not the injury or illness claimed was one covered by worker compensation legislation.[3] For the most part this statutory bar to tort action works to the benefit of both employers and employees to preserve the integrity and efficiency of the system. However, there is one glaring exception to the fairness of the exclusive remedy provision. This exception results from the

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1. In *Blankenship* v. *Cincinnati Milacron Chemicals.*, 433 N.E.2d 572 at 579.

2. In Nova Scotia, for example, the statutory bar does not apply to a claim against a person in a motor vehicle case if the accident happened as a result of the driving of a motor vehicle that is registered or is required to be registered under the *Motor Vehicle Act.* For a case in point see *Chase* v. *Cleary et al.* (1980), 45 N.S.R. (2d) 652. For a comprehensive overview of the various provincial statutes and their exceptions see Ison, T. *Workers Compensation in Canada,* (Butterworths: 1983) 101-105. For an in-depth review of the exceptions in the Ontario worker compensation legislation see Dee, McCombie, Newhouse. *Workers Compensation in Ontario* (Butterworths: 1987) 115-139.

3. The exclusive jurisdiction of the Worker Compensation Boards to determine the issue of whether the action is barred is either explicit in the Act or is found to be conferred in the general section of the Acts which provide that the Board determine all issues of law and fact arising under the Act. See *Mack Trucks* v. *Forget,* [1974] SCR 788, 791. For a detailed account of the various provincial provisions see Ison, Supra note 2 at 124.

fact that worker compensation legislation may be, and appears to have been, interpreted to oust legitimate action taken by an employee against an employer, whose intentional and wilful misconduct injures the employee. It is this inequity, insofar as it shields employers from tort liability for their intentional misconduct, which is the subject of this paper.

A statutory bar restricting the right of a worker to sue in cases of intentional employer misconduct, can be legitimately challenged as inequitable. Such a bar is not only manifestly unjust, but runs counter to the underlying goal of worker compensation schemes to provide employers with the incentive to make significant expenditures to improve and maintain the health and safety conditions in their respective workplaces. The costs of industrial accidents and illness, like other business costs, are expected to be internalized by industry as part of the cost of the production of goods and services. The exclusive remedy provision; however, has been interpreted, and in some provinces legislated, to cover and immunize employers who have acted with wilful, wanton and reckless disregard for the health and safety of their workers.[4] The scope of the exclusive remedy provision has been stretched to the limit to include intentional injuries attributable to the employer. On the other hand, workers whose injuries can be attributed solely to their own serious and wilful misconduct are not covered by the Acts and may, under some circumstances, lose their entitlement to compensation benefits.[5]

In traditional tort law, a person who commits an intentional tort is subject to punitive or exemplary damages. The worker compensation bargain, based on a mandatory no-fault collective liability insurance principle, would appear to suspend employer liability not only for their negligent and grossly negligent acts, but also for acts which are tortious and would otherwise attract a civil suit and the possibility, at least, of punitive damages. It is argued here that legislatures presumably did not intend and could not countenance an interpretation which would result in the immunization of employers from tort damages for their intentional wrongdoing. It is the contention of this paper that an employer's intentional misconduct should not be statutorily barred, but should be recognized legislatively and should be considered to fall outside the worker compensation bargain.

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4. See, for example, the Ontario Worker Compensation Act s. 1(1)(a)(i) which defines an accident to include "a wilful and intentional act, not being the act of the worker."

5. In the various jurisdictions the workers claim is barred if the injury resulted from misconduct unless the injury resulted in death or some form of serious and/or permanent disability. For the various provincial provisions see Ison, supra note 2 at 41.

The purpose of the paper is to set out sound reasons why an exception should be recognized for an intentional tort. The American experience in limiting the scope of the exclusive remedy will be reviewed. The ongoing struggle of the U.S. state courts and legislatures to craft appropriate tests to determine when the employer's conduct will reach a level of culpability, sufficient to avoid the exclusive remedy, will be examined and evaluated in a Canadian context. Finally, it will be argued that certain instances of serious employer misconduct, which are now legitimately sheltered by the provincial Acts, should be addressed by amending worker compensation statutes to provide for punitive or exemplary damages for the injured worker.

II. *The American Experience*

A number of U.S. state courts have held that the exclusive remedy provision does not bar an employee from suing an employer upon a claim of intentional tort.[6] However, early attempts to bring intentional tort actions to avoid worker compensation legislation were almost always unsuccessful since a very narrow interpretation of intent prevailed in the American courts. Up until the late 1970's, the notion of an intentional tort, while recognized in theory, was not of any practical use to an injured worker unless he or she was actually the victim of a direct assault and battery administered by the employer in person. Courts limited recovery to the so-called "true intentional tort" standard which required that an injured worker prove that the employer truly intended the injury as well as the act. Some courts also required that the employer have a specific intent to injure a particular worker.[7] Given the severity of the proof required, it is not surprising that the intentional tort exception languished.

Recently, however, American courts have increasingly been expressing dissatisfaction with the exclusive remedy provision in cases where there is serious employer misconduct.[8] There is a growing willingness on the part of some courts and state legislatures to expand the definition of intentional misconduct in order to hold liable employers who wilfully,

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6. See *ABA National Institute on Workers' Compensation: A Review of Costs, Emerging Developments and Remedies 1986.* See in particular Herrold, "Challenging the exclusivity of the workers' compensation remedy—The Ohio experience", where the author states that a majority of courts recognize the exception p. 138.

7. For a general discussion of the traditional treatment of intentional torts see Notes, "Workers' Compensation: Expanding the Intentional Tort Exception to Include Wilful, Wanton and Reckless Employer Misconduct", 58 *Notre Dame Law Rev.*890 at 895-896.

8. For the most recent case see *Beauchamp* v. *Dow Chemical Co.,* 427 Mich. 1, 398 N.W. 2d. 882 (1986) and see generally Ghiardi, "Intentional Acts — An Exception to the Exclusivity of Workers' Compensation" (1986), 37 *Fed'n Ins.* 7 *Corp. Couns. Q.* 149.

wantonly, and recklessly expose their employees to injury and occupational illness.[9] The increased reliance on the more liberal "substantial certainty" test to determine what constitutes an intentional tort has enhanced the availability of the exception in cases of severe employer intentional misconduct. There is, however, no agreement among the states on the definition of "intentional" conduct. A number of the states still rely on the "specific intent to injure" standard of proof and in some states the substantial certainty standard is given a very restrictive interpretation.[10] This has meant that an employer in some states may knowingly permit dangerous working conditions to exist,[11] may knowingly violate safety and health regulations,[12] and may knowingly withhold information or mislead workers about hazards in the workplace[13] and still be shielded from liability and tort damages by the exclusive remedy rule. Nevertheless, the possibility of a successful claim in intentional tort exists and the expansion of the scope of the intentional tort is gradually underway.

III. *The American Legislative Response*

In response to the willingness of the American judiciary to create a more flexible definition of intentional tort, many state legislatures enacted new provisions to cover employer misconduct. A variety of approaches have

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9. See also In *re Johns-Manville Asbestosis Cases,* 511 F.Supp. 1229 (1981); *Pleasant* v. *Johnson* 312 N.C. 710, 325 S.E. 2d 244 (1985); *Blankenship* v. *Milacron Chemicals,* 69 Ohio St.2d 608, 433 N.E.2d 572 (1982); *Heskett* v. *Fisher Laundry and Cleaners,* 217 Ark. 350, 230 S.W. 2d 28 (1950); *Mingachos* v. *CBS, Inc.,* 196 Conn. 91, 491 A2d 368 (1985); *Boek* v. *Wong Hing,* 180 Minn. 470, 231 N.W.233 (1930); *Austin* v. *Johns-Manville Sales Corp.,* 508 F.Supp. 313, 316 (E.D. Me.) (1981); *Readinger* v. *Gottschall,* 201 Pa. Super. 134, 191 A2d 694 (1963).

10. In particular, Texas has given the substantial certainty test a very strict interpretation, see *Reed Tool Co.* v. *Copelin,* 689 S.W. 2d. 404 at 406, (1985). The court in Reed held that an employer's failure to provide a safe working environment was not intentional misconduct unless substantially certain injury will result. However, in a more recent Texas case, *Rodriquez* v. *Naylor Indus.,* 751 S.W. 2d 701, Levin J. registered a strong dissent. He argued that intent could be inferred from conduct which led to foreseeable injuries. He also reasoned that public policy required that the value of human life must prevail over the financial considerations involved in spreading the cost of business.

11. See e.g. *Penton* v. *Southern Shipbldg.,* 667 F. 2d 500(5th Cir. 1982); *Houston* v. *Bechtel Assocs.,* 522 F. Supp. 1094 (D.D.C. 1981); *Provo* v. *Bunker Hill Co.,* 393 F. Supp. 778 (Idaho 1975); *Kerrigan* v. *Firestone Tire & Rubber Co.,* N.W. 2d 578 (Iowa 1973).

12. See e.g. *Shearer* v. *Homestake Mining Co.,* 557 F. Supp. 549 (D.S.D. 1983); *Brown* v. *R.S. & Sons Painting,* 680 F2d 1111 (5th Cir. 1982); *Cortez* v. *Hooker Chem. & Plastics Corp.* 402 So. 2d 249 (La.Ct. App., 1981); *Evans* v. *Allentown Portland Cement Co.,* 252 A. 2d 646 (Pa. 1969). See also Amchan, "Callous Disregard for Employee Safety: The Exclusivity of the Workers" Compensation Remedy Against Employers (1983), 34 *Lab.L. J.* 683.

13. See e.g. *Austin* v. *Johns-Manville Sales,* 508 F. Supp 313 (D. Me. 1981); *Williams* v. *International Paper Co.,* 129 Cal. App. 3d 810,(1982).

been taken by the various American states. Some state statutes have provisions allowing workers to sue in tort in addition to receiving worker compensation benefits from employers whose wilful misconduct allegedly brought about the injuries.[14] Other states permit workers a cause of action for intentional torts in lieu of compensation.[15] In addition, a number of states provide for punitive or exemplary damages in cases where employer misconduct rises above mere negligence.[16] The extra penalties awarded against employers who breach safety and health provisions both compensate the worker and provide an incentive for providing a safer workplace. However, given the heavy burden of proof on the injured worker required by some states, these provisions have not been frequently utilized. Nevertheless, in the case of a truly egregious employer act, they are available and may provide the measure of justice required to preserve the integrity of the act and to balance off the rights of workers and employers under the worker compensation agreement.

IV. *The American Caselaw*

The first case to advance the intentional tort exception was *Mandolidis* v. *Elkins Industries, Inc.*,[17] a decision of the Supreme Court of West Virginia. In the *Mandolidis* case, the plaintiff was injured while working with a table saw which had no safety guard. Evidence indicated that the employer had ignored several OSHA citations to install protective guards and that other employees had been fired for refusing to work with unguarded saws. The court held that the wilful, wanton and reckless misconduct of an employer constituted "deliberate intent" and thereby fell outside the exclusive remedy rule. The court stated that, "Liability will require a strong probability that harm may result".[18] This broad

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14. See Larson, *The Law of Workmen's Compensation* (1982); For states allowing damage suits in addition to worker compensation benefits see e.g. *Cal. Lab. Code* } 3602 (West Supp. 1985); *Or. Rev. Stat.* } 656.156 (Supp. 1983); *Wash Rev. Code Ann.* } 51.24.020 (Supp. 1985); *W.Va. Code* } 23-4-2(b) (Supp.)

15. See e.g. *Ariz. Rev. Stat.* }23-1022 (Supp. 1984); *Idaho Code* }72-209 (1973); *Ky. Rev. Stat.* } 342.610(4) (1983); *La. Rev. Stat. Ann.* } 23.1032 (West Supp. 1985); *Md. Ann. Code* art. 101, }44 (1979); *N.J. Stat. Ann.* } 34:15-8 (West Supp. 1985); *S.D. Codified Laws Ann.* }62-3-2 (1978).

16. See e.g. *Cal. Lab. Code* & 4553 (West 1971 & Supp 1982) (Increased penalty award for serious and wilful misconduct of employer). A number of other states penalize employers who violate a statute or regulation by increasing compensation to injured workers by 10% to 15%. See e.g. *Ark. Stat.Ann.* & 81-1310(d) (1976 & Supp.1981); *Ky. Rev. Stat.* &342.165 (1979); *Mo. Ann. Stat.* &287.120(4) (Vernon 1965 & Supp.1983) *N.M. Stat Ann.* 52.-1-10 (1978) *N.C. Gen. Stat.* 97-12 (1979); *Utah Code Ann.* 35-1-12 (1953); *Wis. Stat. Ann.* 102-57 (West 1973); *Ohio Const.* art.II, 35.

17. 246 S.E. 2d 907 (W.Va. 1978) *Mandolidis* involved three cases combined on appeal.

18. Id, at 914.

proposition led to a number of large jury verdicts in West Virginia[19] and subsequently the West Virginia Legislature amended its *Code*[20] and limited the holding.[21] Nevertheless, the *Mandolidis* court advanced a very liberal and persuasive non-accidental injury theory which has been favourably received by a number of labour commentators in the U.S.[22]

A second case involved the very problematic class of case in which workers are exposed to toxic substances in their workplace and charge that their employers intentionally misrepresented dangers and/or had intentionally suppressed information about the effect of exposure. A recurring line of these cases had previously been unsuccessful as courts held that worker compensation was the exclusive remedy available. The first exception to the traditional rule was made in 1980 in the Supreme Court of California case of *Johns-Manville Products Corp.* v. *Contra Costa Superior Court.*[23] The plaintiff, Rudkin, developed pneumonoconiosis, lung cancer and asbestosis after being exposed to asbestos over a 29 year period. Rudkin charged that his employer had known since 1924 of the dangers of asbestos, but had wilfully concealed and intentionally misrepresented the hazards to him. Rudkin further alleged that even after he had contracted asbestosis and mesothelioma (a lung cancer positively linked to asbestos), the employer failed to inform him of the causal connection linking his disease to the workplace. The court held that the exclusive remedy provision barred the tort action for the initial injury but allowed a cause of action against the employer for the aggravation of the disease caused by the employer's fraudulent concealment of information with respect to disease causation. The "aggravation doctrine" or "dual injury principle" articulated by the California Court suggests that a tort action will only lie if deliberate conduct by the employer aggravated the original injury. Therefore, in all but the most extreme cases, the exclusive remedy provision will apply.[24] There was a breakthrough, however, in

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19. See generally Note, "In Wake of Mandolidis: A Case Study of Recent Trials Brought Under the Mandolidis Theory" (1982), 84 W. Va. L. Rev. 893.

20. See W.Va. Code $ 23-4-2 (1985).

21. The Code explicitly provides that gross negligence or wilful, wanton, or reckless misconduct does not constitute "deliberate intention."

22. See Folks, "Workmen's Compensation: Employer Misconduct and the Exclusive Remedy" (1979), 32 *Okla L.Rev.* 704; Amchan, "Callous Disregard for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers" (1983), *34 Lab. L.J.* 683; Marlow, "Exclusive Remedy Provisions in the Workers' Compensation System: Unwarranted Immunity For Employers' Wilful and Wanton Misconduct" (1985), *31 South Dakota L.Rev.* 157; Hale, C., Workers' Compensation—A Proposal To Protect Injured Workers From Employers' Shield Of Liability" (1989), 20 St. Mary's L J.

23. 27 Cal. 3d 465, 612 P.2d 948, 165 Cal.Rptr. 858 (1960).

24. The *Johns-Manville* reasoning was adopted by the New Jersey Supreme Court in *Millison* v. *E.I. du Pont de Nemours & Co.*, No. A-1 (N.J. 1985), which held that the fraudulent concealment of already developed diseases is outside worker compensation law.

that the court recognized and stated with some conviction, that compensation legislation should not serve as shield for blatant employer misconduct. More importantly, as a result of this case, the California legislature codified and expanded the intentional tort exception into law.[25] The door was opened for further challenges.

Such a challenge was mounted in Ohio, where the Supreme Court in *Blankenship* v. *Cincinnati Milacron Chemicals Inc.*[26] relied on a broad and liberal definition of intent. *The Blankenship* case is especially notable in that as in the earlier *Johns-Manville* case, it concerned workers injured by exposure to harmful chemicals and allegations of the employer's fraudulent misrepresentation and concealment of workplace hazards. The court held that an injury sustained due to an intentional tort was not an injury in the course of employment.[27] The deliberate exposure of a worker to dangerous substances in the workplace, especially where the employer had wilfully violated a health or safety regulation, constituted an intentional wrong which allowed the worker to pursue a tort action in the courts. In a subsequent Ohio case, *Jones* v. *VIP Development Co.*,[28] the Ohio Supreme Court defined an intentional tort as "an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur".[29] The test lies in the second prong of the definition in the requirement of substantial certainty. The court was careful to point out that this definition provides a safeguard against the possibility of a flood of tort actions by requiring more than mere knowledge and appreciation of a risk by an employer.[30]

In a 1986 case, the Supreme Court of Michigan, in *Beauchamp* v. *Dow Chemical Co.*,[31] adopted the more liberal substantial certainty test and rejected the difficult to prove intentional tort test. The plaintiff, Beauchamp, a research chemist had been exposed to "agent orange" and he claimed that Dow intentionally misrepresented and concealed the potential danger to his health. The court concluded that the legislature had not intended to shield employers from liability for intentional torts and that intentional misconduct would be the type of behaviour the Legislature would most want to punish.[32] Five months after this decision

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25. Act of Sept. 10, 1982, ch. 922,; 6(b)(1)-(2), (1982) *Cal. Legis. Serv.* 4944 (West) The provisions allow for tort actions for intentional employer assaults and fraudulent concealment of existence of injury and its connection with employment.
26. 69 Ohio St. 2d 608, 433 N.E. 2d 572(1982).
27. Id at 612-613.
28. 15 Ohio St. 3d 90, 472 N.E. 2d 1046 (1984).
29. Id at 95.
30. Id.
31. 427 Mich. 1, 398 N.W. 2d 882.
32. Id at 14-17; and 895-897.

the Michigan Legislature amended the Worker's Disability Compensation Act to codify the intentional tort exception. The amendment has been criticized as ambiguous[33], but recognition of the exception exists.

In conclusion, there is no consensus in the U.S. as to the appropriate test to determine when liability should be shifted to the employer. There does appear to be considerable agreement, however, that there are, in fact, cases when such a shift should occur.

V. *The Canadian Experience*

This author could find no caselaw in Canada where an employer's intentionally tortious conduct has been examined in a court. One explanation for this might be that there are no such unscrupulous employers in Canada. Unfortunately, there are a small, but vociferous number of injured workers and workers' dependents who categorically deny this assumption. While the numbers of such employers will be small, there is a growing recognition by courts, legislatures and commentators in the U.S. and by workers and legal clinics in Canada that such employers do exist and that they benefit from their wrongdoing by way of the statutory bar. Notorious cases such as the asbestos exposures by Johns-Manville and the subsequent suppression of information about health hazards in asbestos industries have been well documented.[34]

It is not surprising that there are no cases in Canada. Typically, if a worker wishes to sue his or her employer for an intentional tort the issue of whether or not such a suit is permissible will be adjudicated by the provincial worker compensation board itself.[35] Given that politics and economics inevitably play a part in the operation of the boards, factors other than health and safety are taken into consideration. The limitation of the scope of the statutory bar is perceived as an economic threat to employers, especially given the sweeping changes in the law of torts which has facilitated recovery of tort damages and eroded traditional common law tort defences.[36]

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33. See Note, "Michigan Worker's Compensation Act: The Intentional Tort Exception to the Exclusive Remedy Provision", 23 *Valpariso Univ.L.Rev.* 371.

34. See Brodeur, P. *Outrageous Misconduct: The Asbestos Industry on Trial.*

35. The following provincial acts make specific provision for the determination of the availability of civil suits: R.S.B.C. 1979, c. 437, s.11; R.S.M. 1970, c. W200, s.55(4); R.S.O. 1980, c. 539, s.15; R.S.N.B. 1973, c. W-13, s. 11(2); R.S.N. 1970, c. 403, s.12(4); O.N.W.T. 1977 (1st) c. 7, s.12(3); See also *Smith* v. *Vancouver General Hospital* (1981), 31 B.C.L.R. 358; *Workmen's Compensation Board* v. *CPR and Noell,* [1952] 2 SCR 359; *Mack Trucks* v. *Forget,* [1974] SCR 788. Other jurisdictions confer on the various boards the power to determine all questions of fact and law arising under the acts.

36. See Linden, A., "Public Law and Private Law: The Frontier from the Perspective of a Tort Lawyer" (1976), 17 *Cahiers de droit* 831. For a discussion of changes in American tort law

VI. *Recognition of the Intentional Tort Exception in Canadian Jurisdictions*

It is the contention of this paper that an intentional tort committed by an employer should be recognized by courts and explicitly addressed by legislative amendment in the various provincial worker compensation acts. While it is not suggested that intentional misconduct by employers is a frequent occurrence in Canada, it occurs often enough that a small group of injured workers have become extremely embittered and hostile to the current systems. Worker compensation critics are among the most bitterly vociferous of all Canadians, as politicians in all provinces can attest. Reports of suicides by workers who have despaired of the system occasionally make the news. Such profound discontent with the system by these groups is paradoxical in light of the fact that Canadian compensation benefits and regimes are recognized as being among the most generous and progressive worker compensation schemes.[37]

It is notable however, that Canadian provincial legislation does not provide safety valves by way of punitive or exemplary damage provisions for workers who have suffered outrageous employer misconduct. As a result, worker compensation schemes have been interpreted in such a way that an unscrupulous employer can be consciously indifferent to the results of an obvious risk and avoid personal liability when an injury will foreseeably occur. The classic case is the employer's intentional and fraudulent suppression of information about workplace hazards. The failure to recognize and deal with the employer's deliberate misconduct allows the employer or corporation to "cost out" investment decisions that are likely to result in injury.[38] The affront to a worker's health, safety and dignity when such events take place cannot be underestimated. An intentional injury changes the fundamental nature of the worker compensation bargain. The aggrieved worker no longer is interested merely in compensation, but in some acknowledgement that an injustice has been done. The victims of deliberate wrongdoing have a real need to confront the author of their misfortune in order to assert a right and to take some control of their lives. The injustice which results when this remedy is denied undermines the integrity of the worker compensation

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see Page, "The Exclusivity of the Workmen's Compensation Remedy: The Employee's Right to Sue his Employer in Tort" (1963), 2 *B.C. Indus. and Com. L.Rev.* 555.

37. See Bart, and Hunt, *Workers' Compensation and Work-Related Illnesses,* (Cambridge: MIT Press, 1980).

38. American commentators are increasingly making this point. See generally Comment, "Exclusive Remedy Provisions in the Workers' Compensation System: Unwarranted Immunity for Employers' Wilful and Wanton Misconduct (1985), 31 *S.D.L. Rev.* 157. See also Amchan, supra note 22 and Hale, supra note 22.

system overall. Contempt for the unscrupulous employers affects and harms the vast majority of conscientious and careful employers as well.

The preservation of the employee's common law action against employers if injury or death results to a worker from the deliberate intention of an employer has not been made explicit in most provincial compensation acts. Moreover, in Ontario, the definition of accident appears to explicitly preclude the availability of an exception for an intentional tort.[39] Nevertheless, in those provinces which have not explicitly precluded the exception and even in Ontario, it can be argued that the court should examine the legislation carefully in order to ascertain the true meaning, purpose and intent of the legislation.

Worker compensation legislation was introduced in Canada and enacted by the provinces between 1914 and 1950.[40] It was enacted, in part, as a humanitarian response to redress the great difficulty workers had in achieving compensation for injuries and death suffered in the workplace. Prior to this legislative reform, a worker who brought an action against his or her employer was faced with the almost impossible task of overcoming the harsh common law defences available to employers; the defences of contributory negligence, voluntary assumption of risk and the fellow servant doctrine.[41] Only a small percentage of workers recovered under this system and the burden of accidental injury which was the inevitable result of the industrial revolution fell heavily on the shoulders of the workers.[42] The new legislation provided a more humane system which attempted to balance the interests of both employers and their workers by minimizing and equally distributing this burden. Deliberate employer activity which injures, sickens or kills workers was never intended to be covered by worker compensation schemes. Rather, the tort system which operated to the detriment of workers and which was a potentially expensive and time-consuming nuisance to employers was to be supplanted by a system which removed *negligently* caused industrial accidents from the common law tort system.

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39. See R.S.O. 1980, c. 539, s.1(1)(a)(i). Accident is defined as a wilful intentional act, not being the act of the worker.

40. See Ison T., supra note 2, for a complete listing of the Acts and their respective dates at 1.

41. A discussion of the defences can be found in most tort textbooks, see for example, Fleming, *The Law of Torts,* 6th ed., (1983). For a discussion of the defences and caselaw in Ontario see Dee, McCombie, and Newhouse, supra note 2 at 3-5. See also Linden, supra note 36 at 837.

42. For an Ontario example see Risk, "The Law and the Economy in Mid-Nineteenth Century Ontario: A Perspective", 27 U.T.L.J. 403. Risk provides data for court cases in Ontario during a period from 1888-1914, p426-430. In the U.S., Prosser in the *Handbook of the Law of Torts,* at 526 (4th ed.) stated that from 70% to 94% of workers remained uncompensated.

Statutory coverage of negligence is consistent with the underlying policy of worker compensation to provide compensation recovery for the *inherent, inadvertent* risks which are an inevitable side effect of any industrial system. To suggest otherwise requires a condonation of deliberate employer misconduct and the negation of the humanitarian purposes which underlie worker compensation schemes.

From another perspective, worker compensation legislation is public interest legislation, and should be liberally construed. Therefore, it is hard to support an interpretation that an intentional tortious injury is a natural risk which "arises out of and in the course of employment" and which is comprehended in the statutory bar. The nature of a risk is that it is a chance of encountering harm; any intentional misconduct makes harm a substantial certainty. Given that worker compensation is founded on an insurance principle based on a statistical possibility of risk, it would be against public policy to insure against an intentional harm.

In addition, one of the goals of worker compensation is to promote a safe and injury free work environment. To this end, some worker compensation boards have provisions enabling them to levy financial penalties above and beyond the normal assessment levels.[43] While these penalties have the potential to deter some accidents by ensuring safer workplaces, they have not been particularly effective. In the first place, they are infrequently levied. Secondly, when they have been utilized they have basically been used to improve safety and have ignored health hazards.[44] Moreover, these penalties do nothing for the injured worker whose compensation benefit is not increased as a result of an intentional injury. Empowering the injured worker to opt for a civil suit in egregious cases provides a more effective incentive to employer responsibility.

Accident and injury rates in Canada continue to rise. An American commentator notes:

> It would be nice to think that employers are impelled by humane motives to consider the health and safety of their employees as the paramount concern. But the unfortunate truth is that business reacts best to hopes of profit maximization. Where some employers can avoid more costly protections for their employees without incurring additional liability, they usually will do so. Employers generally will act only if given the monetary incentive to do so.[45]

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43. See Ison, supra note 2 at 144.
44. See Working Paper 53, *Workplace Pollution,* Law Reform Commission of Canada, 1986 at 58; and see Amchan supra note 22 at 686, who notes that the worker compensation objective for encouraging health and safety has been thwarted because assessment levels do not reflect the full costs of health and occupational injuries.
45. See Schroeder, supra, note 7 at 895.

The creation of an exception has already been made in Canadian jurisdictions with respect to misconduct by a worker. If it can be shown that a workplace injury resulted from serious and wilful misconduct on the part of the employee, the worker's claim for benefits may be barred unless the worker is killed or seriously disabled.[46] The rationale for this provision, as outlined by some provincial boards, is that such intentional and deliberate misconduct (e.g. horseplay, larking or fighting) does not arise "out of or in the course of employment".[47] A corresponding exception applied to the employer for the same reason seems only fair.

VII. *Constitutional Challenges to the Statutory Bar*

Attempts to create exceptions to the exclusive remedy rule on constitutional grounds have been unsuccessful. Constitutional challenges to the statutory bar emerged immediately after the enactment of the *Canadian Charter of Rights and Freedoms.* Early cases[48] argued that there is a Charter based "right to litigate" and that the exclusive remedy provision violated section 7 of the Charter. Later cases argued violations of both section 7 and section 15.[49] The *Piercey* case received particular attention and was very controversial. In *Piercey,* a Newfoundland widow whose husband was electrocuted at his workplace, complained that the exclusive remedy provision was unconstitutional because it deprived the workers and their dependents of their equality rights guaranteed in section 15 of the Charter. While Mrs. Piercey's claim failed for timeliness, Chief Justice Hickman was sympathetic to the argument of a section 15 violation and to the argument that substitution of a tribunal for a court was contrary to the Charter. In the course of balancing rights under section 1 he cited jurisdictions which had retained the right of tort action while still attaining the goals of worker compensation in a legislative framework. He was concerned that a total restriction on an injured person's access to court was "an intolerable blot upon the legislative landscape of a free and democratic nation."[50]

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46. See Ison supra note 2 at 41-42 for provincial variations to this exception.
47. See in general Ison, Workers Compensation in Canada, Butterworth & Co. (1983) and see B.C. Decision No. 194 (1976), 2 W.C.R. 309 and see Ontario WCAT Decision No.337, August 1986. See also Gilbert, *A Guide to Workers' Compensation in Ontario,* Canada Law Book, 1989, at 16.
48. *Re Terzian et al.* v. *Workman's Compensation Board of Ontario* (1983), 42 O.R. (2d) 144; *Ryan* v. *Worker Compensation Board* (1984), 6 O.A.C. 33.
49. See for example, *Budge* v. *W.C.B. of Alberta,* [1985] 34 Alta. L.R. (2d) 97; revd. [1987] 42 Alta L.R. (2d) 26 (C.A.) and *Piercey* v. *General Bakeries Ltd.* (1986), 31 D.L.R. (4th) 373, 61 Nfld & P.E.I.R. 147 (T.D.); *Reference Re Sections 32 & 34 of the Workers' Compensation Act (Nfld)* (1987), 67 Nfld & P.E.I.R. 16, 206 A.P.R. 16, [1988] C.C.L. 3715 (Nfld. C.A.).
50. (1986), 31 D.L.R. (4th) 384.

The potential implications of this broad proposition were given nationwide media coverage and resulted in the government of Newfoundland referring the constitutional questions to the Newfoundland Court of Appeal. Intervenor status was given to worker compensation boards, unions and employer groups from across Canada which thereafter formed a rare coalition of uncomfortable bedmates. The issue in the Court of Appeal was redefined to determine whether the removal of the right to sue would create an inequality among groups of injured persons. The court found no such violation of section 15 of the Charter. On appeal to the Supreme Court of Canada, the court did not even allow for final arguments and swiftly dispensed with the case in a single paragraph which stated that the Newfoundland legislation did not, in the circumstances presented, violate section 15 of the Charter.[51] The *Piercey* case should not suggest that any challenge, constitutional or otherwise, which threatens the statutory bar will automatically be defeated. The recognition of an intentional tort action against an employer is in no way incongruent with the *Piercy* decision. An intentional tort falls outside worker compensation legislation. In fact, although we have only the bare bone facts in *Piercey,* it is possible to speculate that Mrs. Piercey's challenge was the result of her frustration, anger and deep sense of injustice caused by the circumstances surrounding the death of her husband. There being no provision for punitive damages or any precedent for an action in intentional tort, she chose to challenge the entire worker compensation system.

The integrity and efficiency of the worker compensation systems will be strengthened and not undermined by the recognition of an intentional tort exception and/or by provisions allowing punitive damages. These options, to be triggered when circumstances warrant, will provide a safety valve to diffuse the legitimate anger and hostility created by the inequity of shielding unscrupulous employers from the consequences of their deliberate misconduct.

VIII. *Intentional Conduct — a Definition*

Difficult questions remain. How should intentional misconduct be defined? What state of mind is required to constitute intent? Who must have intentionally caused the injury? Must the consequences have been intended? When does an employer's behaviour reach the level of culpability required for an intentional tort? The scope of the intentional tort exception in workplace injury cases must be clearly delineated and

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51. *Re Workers' Compensation Act, 1983 (NFLD.),* [1989] 1 S.C.R. 923.

must be placed in a legal context which will be both strict enough to discourage frivolous and unworthy suits but, liberal enough to ensure that outrageous deliberate employer misconduct will attract liability. An American Judge sums up the problem;

> "There are definitions of intent in the books more variant than the manifold uses to which word is put. They range from the statement that a man is presumed to intend the ordinary and usual consequences of his acts, to definitions which make intent practically depend upon the existence of actual malice. In its nature, it is bound to be the existence of a state of mind, and since that state of mind must be arrived at in proof by the establishment of facts extraneous to the mind itself, it seems to us that it is always bound to be a deduction or conclusion from the facts so established."[52]

1. *Requirements for Liability*

(i) *What constitutes intentional misconduct?*

American courts and commentators have disagreed on the question of the requirements for an intentional injury. Depending on the political climate, different requirements have been advocated at various times. Some commentators and a few courts have taken a very liberal view and would provide a common law remedy where the employer has acted with wilful, wanton and reckless disregard of the employee's health and safety.[53] This approach is premised on the belief that acts of negligence and wilful torts are different not only in degree, but in kind.[54] In *Mandolidis,* the court stated that intention can be ascertained from either verbal or non-verbal conduct, but that in most cases it must be inferred from a person's conduct. In deciding what constitutes deliberate misconduct *Mandolidis* states that the court should focus on the probability that a given result will follow and on the degree of seriousness of harm.[55] The test arising from *Mandolidis* is the very loose and broad "strong probability of harm" test.[56]

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52. *Collins* v. *Dravo Contracting Co.,* 114 W. Va. 229, 171 S.E. 757 (1933).

53. See Schroeder, supra, note 7. Schroeder advocates that an employee alleging wilful employer misconduct should be permitted to both institute his or her claim for workers' compensation and bring suit against the employer. Any tort recovery would be set off against any worker compensation award to prevent double recovery. See also *Mandolidis* v. *Elkins Ind.,* 246 S.E.2d. 907,914.

54. Id. at 896.

55. Id at 759.

56. It should be noted that after the *Mandolidis* decision the West Virginia legislature expressly rejected wilful wanton and reckless misconduct as the basis for establishing intentional misconduct. The legislature feared a flood of litigation would follow and the legislature amended the Code to require that the employer act with "a consciously, subjectively and deliberately formed intention to produce the specific result of injury or death to an employee; See W.Va. Code 23-4-2(c)(2)(i) (1985).

At the opposite exteme, a few courts have taken a very narrow view requiring that the employer truly intend the injury as well as the act.[57] This requirement when strictly interpreted is even more stringent than the criminal standard and virtually ensures that no exceptions for intentional torts will ever be made.

A middle ground view requires that the employer know with "substantial certainty" that injury will occur. This approach has been adopted by the Michigan court in *Beauchamp*.[58] Levin J. held that the substantial certainty test defines the intentional tort more broadly than the "true intentional tort" test. He then tracked the wording of the *Restatement of Torts*[59] and concluded that the employer's conduct would not be immune from liability if the employer intended the act that caused the injury and knew that injury was substantially certain to occur from the act.[60]

The "substantial certainty" requirement appears to be the most promising approach for a Canadian adaptation. It avoids the very loose and liberal approach of separating recklessness from negligence but it is more liberal than the narrow emphasis on proof of the defendant's motivation. The requirement that the employer have knowledge of a substantial certainty that injury will result appears to achieve the required balance.

(ii) *Who intentionally caused the harm*

The question of who must have intentionally caused the injury in order to hold the employer liable is also an interesting one. Since modern employers are often corporations or institutional employers, the requirement that the employer act in person or act to have specifically authorized the particular act, will render the exception virtually useless. At the same time, it is unreasonable to hold the employer liable for every isolated intentional injury inflicted by a co-worker or by a supervisor. Therefore, it has been suggested that when injuries are the result of conscious corporate decisionmaking, liability should result.[61] Consequently, managerial decisions made by authorized, responsible decision-makers which result in injuries could be subject to tort action.

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57. See *Miller* v. *Ensco, Inc.,* 286 Ark. 458. 462 (stating that the intent must be based on a "deliberate act by the employer with a desire to bring about the consequences of the act). See also *Hildebrant* v. *Whirlpool Inc.,* 364 N.W. 2d 394, 396.
58. 427 Mich.1 at 11, 398 N.W. 2d at 886.
59. *Restatement of Torts,* 2d & 8.
60. 427 Mich. 1 at 20; 398 N.W. (2d) at 895.
61. See King, J. "The Exclusiveness of an Employee's Remedy Against his Employer," 55 Tenn. L.Rev. 405, 450.

Additionally, condonation or ratification of decisions taken which affect the worker would also attract liability.

(iii) *What Consequence must have been Intended?*

Assuming that a version of the substantial certainty test is preferred, what result or consequence should the employer have desired or have knowledge of to a substantial certainty? Does mere knowledge that a risk exists suffice? Most U.S. courts have required that the intentional acceptance of a risk is not sufficient to attract liability.[62] The *Beauchamp* court provided a possible approach. The plaintiff in *Beauchamp* had been exposed to Agent Orange in the course of his employment and the court speculated that if the employer had knowledge to a substantial certainty of the exposure to such a significant harm, then liability might result.[63] Therefore, a possible rule might require that when the employer has knowledge to a substantial certainty not merely of a risk, but of a harmful proximity, exposure etc., then liability may result. To require that the employer intend the consequences i.e. the harmful result as well as the act, would make the exception too narrow. A test which falls between accepting a risk and desiring an injury sufficiently expands the definition of an intentional injury to make it viable.

In summary, employer conduct can range from intentional and wilful conduct through to grossly negligent and merely negligent conduct. Depending on how expansive an exception a court or provincial legislature wishes to create, the intentional tort could be defined as either wilful misconduct or intentional misconduct. The wilful misconduct would arise in the event that an employer is consciously indifferent to the results of an obvious risk i.e. there is a high probability of injury or death. The stricter test for intentional misconduct would require the substantial certainty of harm. With either test severe employer misconduct could be penalized either by recognition of an intentional tort or by enacting legislative provisions allowing for punitive or exemplary damages within the worker compensation scheme.

IX. *Conclusion*

It is uncertain whether or not the intentional tort exception exists in Canada. It is the contention of this paper that such an exception should be recognized. As long as the statutory bar in worker compensation statutes continues to immunize employers from the results of their

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62. For some examples see *Reed Tool Co.* v. *Copelin,* 689 S.W. 2d. 404, 406-407 (1985); see also *McCormick* v. *Mark Heard Fuel Co.,* 183 Ga.App. 488(1987).
63. 427 Mich. 1 at 4.

deliberate acts, a worker's health and safety is jeopardized in the aim of achieving cost efficiency. The bargain which was struck in the worker compensation schemes was to cover negligent not intentional conduct. Worker compensation legislation sought to balance the rights of worker and employer in a mutually beneficial manner. While this balance is maintained in the vast majority of cases, the profound dissatisfaction felt by a small group of workers who believe they have been deliberately harmed and therefore unfairly compensated, is casting a pall over the entire system. Injured workers, advocates and legal aid clinics can attest to the inequities that exist when employers can inflict injury in the name of profit maximization.

One solution is for either courts, but preferably for legislatures, to create and enforce an exception for deliberate employer misconduct. If intent can be inferred when an employer ignores obvious health and safety hazards, sanctions should follow by way of an action in intentional tort. The test for determining when an employer's behaviour has reached the level of intentional misconduct should be limiting, but not so restrictive as to make the exception exist in name only. The American tests of "substantial certainty" and "strong probability of harm" provide a useful starting point for the construction of a Canadian standard.

Statutory amendments should be enacted to allow workers deliberately injured by their employers to recover punitive or exemplary damages and/or to have the right to sue. Such measures would enhance the image of worker compensation plans, would work to the benefit of conscientious employers, and would better compensate victims of deliberate misconduct. A worker compensation system which is perceived to be fair is less likely to be undermined.